

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of
the Interior, et al.,

Defendants.

No. 1:96CV01285
(Judge Robertson)

**DEFENDANTS' REPLY IN SUPPORT OF MOTION
TO RESOLVE PENDING MATTERS PERTINENT TO THE
EVIDENTIARY HEARING THAT BEGAN ON OCTOBER 10, 2007**

On October 25, 2007, the Court invited the parties to file a motion identifying pending matters relevant to the evidentiary hearing on the historical accounting. Tr. 2185:5-13.

However, the Court proscribed additional briefing related to the underlying motions. See Tr. 2185:7-13 ("I certainly don't want them rebriefed, but if either side wants to file . . . a motion to resolve motions or something that you think needs – a list of things you think need my attention before I get around to ruling on the merits of this, let me have it . . .").

On December 4, 2007, Defendants filed such a motion merely listing relevant pending matters, without argument. See Defendants' Motion To Resolve Pending Matters Pertinent to the Evidentiary Hearing that Began on October 10, 2007 (Dkt. No. 3458) ("Defendants' Motion"). In their Response to Defendants' Motion, Plaintiffs ignore the Court's proscription on supplemental briefing and include additional argument related to the underlying motions. See Plaintiffs' Response at 2.

In particular, Plaintiffs claim to have identified "supplementary support" for arguments made in their opposition to Defendants' Motion to Rescind Or, in the Alternative, to Amend

the Class Communication Orders (June 22, 2007) (Dkt. No. 3348) (“Motion to Rescind”). Plaintiffs claim that “[a]dditional information, subsequent to the briefing of the subject motions, was revealed by defendants immediately preceding the October trial.” Plaintiffs’ Response at 2. The “highly relevant” additional information, Plaintiffs claim, takes the form of so-called “admissions” in the Historical Accounting Plan filed by Defendants on May 31, 2007 – almost four months before the October trial and twenty-two days before the Motion to Rescind was filed and thirty-seven days before Plaintiffs’ Opposition was filed on July 6, 2007. Plaintiffs ask the Court to treat these “admissions” as “supplementary support” for their opposition. Plaintiffs’ Response at 2.¹

Defendants disagree with the interpretation that Plaintiffs give to the language in the Plan, but will not provide additional briefing on this matter unless requested by the Court. However, because Plaintiffs improperly include supplementary briefing in their Response, Defendants ask that the Court disregard this supplementary argument, especially since the information was available at the time that they filed their opposition to the underlying motion.

The only argument in their Response that relates to Defendants’ Motion is Plaintiffs’ claim that resolution of the four matters identified in the Motion “will inevitably result in collateral proceedings.” Plaintiffs’ Response at 1. Plaintiffs do not identify the nature of these proceedings or explain why they are “inevitable,” but nevertheless they request that any decision on the matters identified in Defendants’ Motion be held in abeyance. Id.

^{1/} Surprisingly, the citation for these “admissions” – and the information that Plaintiffs ask to be treated as a supplement – is not the Plan itself, but rather Plaintiffs’ Proposed Findings of Fact, filed on November 30, 2007. See Plaintiffs’ Response at 2 n.2.

Plaintiffs made this same argument in their Opposition to the Motion to Rescind (Dkt. No. 3356). See Opposition at 2-3.² In ruling on the underlying motion, the Court will thus necessarily rule on this very argument. Plaintiffs have not, therefore, provided any reason to delay resolution of the underlying matters.

Dated: December 21, 2007

Respectfully submitted,

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² In their Opposition, Plaintiffs requested that the Motion to Rescind should not be resolved until after a decision in the October trial. Opposition at 3 n.4. In their Response, Plaintiffs now ask that the Court wait until after an “equitable remedies” trial – presumably one involving a transfer of money from the United States to the Plaintiffs – has been held. Response at 1.

CERTIFICATE OF SERVICE

I hereby certify that, on December 21, 2007 the foregoing *Defendants' Reply in Support of Motion to Resolve Pending Matters Pertinent to the Evidentiary Hearing That Began on October 10, 2007* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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/s/ Kevin P. Kingston

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